IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

KENNETH W. ANDERSON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	2:03-CV-0085
	§	
JO ANNE BARNHART,	§	
Commissioner of Social Security,	§	
	§	
Defendant.	§	

REPORT AND RECOMMENDATION

Plaintiff KENNETH W. ANDERSON, brings this cause of action pursuant to 42 U.S.C. § 405(g), seeking review of a final decision of defendant JO ANNE BARNHART, Commissioner of Social Security (Commissioner), denying plaintiff's application for a term of disability, and disability benefits. Both parties have filed briefs in this cause. For the reasons hereinafter expressed, the undersigned United States Magistrate Judge recommends the Commissioner's decision finding plaintiff not disabled and not entitled to benefits be AFFIRMED.

I.
THE RECORD

Plaintiff applied for supplemental security income benefits (SSI) and disability insurance benefits under Titles II and XVI of the Social Security Act on July 17, 2001 with a protected filing date of July 13, 2001. (Transcript [hereinafter Tr.] 49-52). Plaintiff claims to have injuries

including carpal tunnel syndrome in both hands, replacement of the right elbow ulnar nerve, and post-operative back impairments. (Tr. 14, 66, 159; Plaintiff's Brief at 2-3). Several onset dates have been cited in the record dating as far back as November 27, 1995 (Tr. 49, 61). However, it appears plaintiff had applied for and been denied benefits on December 31, 1998. The record reflects plaintiff quit working on either June 10, 2001 or June 15, 2001. (Tr. 66). As articulated by defendant, for the purposes of this appeal, the period at issue dates from the date plaintiff protectively filed his application, July 13, 2001, until the date of the Administrative Law Judge's (ALJ) decision, October 21, 2002. *See* 42 U.S.C. §1382(c)(7); 20 C.F.R. §416.335 and §416.501.

It was determined at the administrative level that plaintiff had not engaged in substantial gainful activity since the date he protectively filed for SSI benefits. (Tr. 14, 18). Plaintiff was born October 16, 1963 (Tr. 49, 180), and attended school through the eighth grade. (Tr. 182). The record reflects plaintiff's only past relevant work is the job of mechanic. (Tr. 14, 182).

Plaintiff filed a Request for Hearing before an Administrative Law Judge and a hearing was held on September 12, 2002 before ALJ William F. Nail, Jr. (Tr. 176-208). On October 21, 2002, ALJ Nail, Jr. rendered an unfavorable decision, finding plaintiff not entitled to benefits at any time relevant to the decision. (Tr. 19). The ALJ determined plaintiff was unable to return to his past relevant work. (Tr. 19, Finding #7). The ALJ further found plaintiff to have,

> [T]he residual functional capacity to perform a limited range of light work. He has carpal tunnel syndrome in his hands and cannot perform work requiring continuous hand use.

(Tr. 19, Finding #6).[1] In making such findings the ALJ determined plaintiff could perform a significant numbers of jobs in the national economy including *laundry folder*, *sales attendant*, *shipping and receiving weigher*, and *surveillance system monitor*. (Tr. 18). The ALJ thus concluded plaintiff was not under a disability at any time through the date of his decision.

On January 24, 2003, the Appeals Council denied plaintiff's request for review of the decision of the ALJ, rendering the ALJ's decision the final decision of the defendant Commissioner. (Tr. 5-7).[2] Plaintiff now seeks judicial review of the denial of benefits pursuant to 42 U.S.C. §405(g).

II.
STANDARD OF REVIEW

In reviewing disability determinations by the Commissioner, this court's role is limited to determining whether substantial evidence exists in the record, considered as a whole, to support the Commissioner's factual findings and whether any errors of law were made. *Anderson v. Sullivan*, 887 F.2d 630, 633 (5th Cir. 1989). To determine whether substantial evidence of disability exists, four elements of proof must be weighed: (1) objective medical facts; (2) diagnoses and opinions of treating and examining physicians; (3) claimant's subjective evidence of pain and disability; and (4) claimant's age, education, and work history. *Wren v. Sullivan*, 925 F.2d 123, 126 (5th Cir. 1991) (citing *DePaepe v. Richardson*, 464 F.2d 92, 94(5th Cir. 1972)). If the Commissioner's findings are supported by substantial evidence, they are

[1]The ALJ also has at Tr. 19, Finding #11 which says, "The claimant has the residual functional capacity to perform a significant range of light work. 20 CFR §416.967." While these may be construed as inconsistent, the Court understands the ALJ to have relied on Finding #6 which benefits plaintiff since it is more restrictive.

[2]A review of the record Tr. at 5-7, includes a very light date stamp which is illegible. According to the "Court Transcript Index" the reporter has listed such date as January 24, 2003.

conclusive, and the reviewing court may not substitute its own judgment for that of the Commissioner, even if the court determines the evidence preponderates toward a different finding. *Strickland v. Harris*, 615 F.2d 1103, 1106 (5th Cir. 1980). Conflicts in the evidence are to be resolved by the Commissioner, not the courts, *Laffoon v. Califano*, 558 F.2d 253, 254 (5th Cir. 1977), and only a "conspicuous absence of credible choices" or "no contrary medical evidence" will produce a finding of no substantial evidence. *Hames v. Heckler*, 707 F.2d at 164. Stated differently, the level of review is not *de novo*. The fact that the ALJ could have found plaintiff to be disabled is not the issue. The ALJ did not do this, and the case comes to federal court with the issue being limited to whether there was substantial evidence to support the ALJ decision.

III.
MERITS

Plaintiff's brief in support of his application presents the following issues for review:

A. The ALJ erred when he determined plaintiff did not have a listed impairment under Listing 1.02;

B. The ALJ erred when he failed to adopt the views of physicians who stated plaintiff was disabled due to pain; and

C. The hypothetical posed to the Vocational Expert was defective.

The ALJ made the determination that plaintiff is not disabled at Step Five of the five-step sequential analysis. Therefore, this Court is limited to reviewing only whether there was substantial evidence in the record as a whole supporting a finding that plaintiff retained the ability to perform other work that exists in significant numbers in the national economy, and whether the proper legal standards were applied in reaching this decision.

A.
Listed Impairment

Plaintiff argues the ALJ erred because he failed to find plaintiff's bilateral carpal tunnel syndrome met Listing 1.02B. Such Listing states,

> *Major dysfunction of a joint(s) (due to any cause)*: Characterized by gross anatomical deformity (e.g. subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With:
>
> ....
>
> B. Involvement of one major peripheral joint in each upper extremity (i.e. shoulder, elbow, or wrist-hand), resulting in inability to perform fine and gross movements effectively as defined in 1.00B2c.

20 C.F.R. Pt. 404, Subpt. P, App. 1. Listing 1.02. The inability to "perform fine and gross movements effectively," as explained in the listings means,

> [A]n extreme loss of function of both upper extremities; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities. To use their upper extremities effectively, individuals must be capable of sustaining such functions as reaching, pushing, pulling, grasping, and fingering to be able to carry out activities of daily living. Therefore, examples of inability to perform fine and gross movements effectively include but are not limited to, the inability to prepare a simple meal and feed oneself, the inability to take care of personal hygiene, the inability to sort and handle papers or files, and the inability to place files in a file cabinet at or above waist level.

20 C.F.R. Pt. 404, Subpt. P, App. 1. Listing 1.00B2c. Although plaintiff testified he drops objects and has no feeling in his fingers or that they "draw up" (Tr. 184), he also admitted under oath he can drive up to five times a week, for example to go to the store (Tr. 187), he can occasionally eat out (Tr. 189), he sometimes helps with housework like cooking, cleaning and

dish washing, he mows the yard, and helps with the laundry (Tr. 190). He further testified he can generally shower by himself, dress himself (with the assistance of his daughter who ties his shoes), can take care of his own hygiene (brushing teeth and shaving) and can feed himself. (Tr. 192). It does not appear from plaintiff's own testimony he meets the requirements of Listing 1.02. Further, as articulated by defendant, plaintiff was evaluated by Dr. Ivan Mahady on November 13, 2001 who found plaintiff could fully extend his hands, he could make a fist, he had normal grip strength in both hands had no sign of atrophy. (Tr. 132-133). The doctor's notes also reflect that upon questioning plaintiff stated that he could not hold a skillet or a broom and he could not hold his hands over his head, but that he could write, hold a cup of coffee, open a jar, and button his own shirt. (Tr. 130). Plaintiff has directed the Court to the findings of physician Dean Brown, D.O., who reported on November 6, 2002 that plaintiff had undergone surgery for carpal tunnel syndrome with an ulnar nerve transplant due to ulnar nerve syndrome, that plaintiff still suffered from arm, upper back and neck pain with numbness in his hands, and that plaintiff was unable to engage in work involving bending, stooping, lifting or grasping "for at least a year longer." (Tr. 173). As argued by defendant, these functional limitations are contrary to plaintiff's own description of his daily activities. (Defendant's Brief at 7). The medical records and plaintiff's own testimony of his abilities contradict the limitations set forth in the regulations for Listing 1.02 and plaintiff has not shown himself to be incapable of performing fine and gross movements to the degree contemplated by 20 C.F.R. Pt. 404, Subpt. P, App. 1. Listing 1.00B2c. Plaintiff's first claim fails.

B.
Plaintiff's Pain and the Medical Opinions of Record

Plaintiff next argues his, "claim is primarily based upon severe pain [which is] greatly aggravated by any long-continued physical exertion." (Plaintiff's Brief at 5). The ALJ considered plaintiff's subjective complaints of pain but found, based upon the medical evidence, such complaints lacked credibility, a determination within the jurisdiction of the ALJ. The ALJ stated,

> Specifically, while the claimant alleges severe, disabling back pain, objective findings on physical examination and radiology studies have been minimal. MRI studies of the lumbar spine performed on September 15, 2001, revealed an abnormal signal at L4-5, but noted no definite herniated or extruded discs.
>
> A CT scan of the lumbar spine performed on October 19, 2001, did show a filling defect at L4-5 suggesting left-sided disc herniation causing impingement of the left L5 existing nerve root. However, the T-12-L1, L1, L2-3, and L3-4 disc spaces were all well maintained.
>
> X-rays of the lumbar spine performed on November 13, 2001, revealed an essentially normal lumbar spine.

(Internal citations omitted, replaced with Tr. cites)(Tr. 127-129; 135). As argued by defendant, the ALJ is not required to accept plaintiff's subjective complaints of debilitating pain but is required to evaluate such complaints in the context of the medical evidence to determine whether pain is debilitating. (Defendant's Brief at 8, citing *Loya v. Heckler*, 707 F.2d 211, 214 (5th Cir. 1983)). Based upon the ALJ's opinion, the medical evidence cited therein, and plaintiff's own testimony about his daily activities, it cannot be said the ALJ erred in his credibility finding. Plaintiff's claim is without merit.

C.
Plaintiff's Limitations and the Hypothetical

Finally, plaintiff argues the ALJ erred procedurally because he failed to fully and adequately present all of plaintiff's limitations. Specifically plaintiff takes issue with the ALJ's characterization that plaintiff has the "general use of his hands," that plaintiff can lift up to ten (10) pounds but failed to clarify whether this was occasionally or continuously, and that the ALJ failed to question the Vocational Expert (VE) about the length of time plaintiff could perform various activities. (Plaintiff's Brief at 6). At the administrative hearing, VE Pamela Bowman was called to testify. Prior to questioning such expert, the ALJ had the following exchange with plaintiff:

ALJ: Mr. Anderson, if I am - - what I wrote down [INAUDIBLE] you said that you can only sit about 30, 45 minutes at a time?
CLMT: Yes, sir.
ALJ: That you could only stand for about two to three hours at a time?
CLMT: Yes, sir.
ALJ: And you lift about 10 pounds?
CLMT: Yes, sir.

(Tr. 201). Thereafter, the VE was questioned and the following hypothetical posed:

Q: Okay. If we were to consider then hypothetically, Ms. Bowman, the age, education, background and experience of the Claimant which we find is limited. This individual can only lift about 10 pounds. Has general use of his hands, but would not be able to use his hands on a continuos (sic) [basis]. Sits for about 30, 45 minutes at a time. Stands for about two or three hours at a time. Can read basic material, but is not highly educated. With those limitations, would the individual described be able to do the kind of work that you described [as an automobile mechanic, medium work, lifted 50 pounds and skilled with a SPB of seven].

A: No, Your Honor.

Q: Any transferable skills to jobs that would satisfy [the] hypothetical?

A: No, Your Honor.

Q: How about jobs in the economy?

(Tr. 202-203). To which the VE testified such a person would be capable of performing the job of *laundry folder*, unskilled, light with 40, 500 jobs in the national economy and 2,300 jobs in Texas, *sales attendant*, unskilled, light with 4,086,000 jobs in the national economy and 22,800 jobs in Texas, and *shipping and receiving weigher*, unskilled, light with 46,000 jobs in the national economy and 1,600 jobs in Texas. (Tr. 203). The VE then reduced these job numbers, based upon the hypothetical, by fifty percent (50%). (*Id*.). Finally, the VE determined the job of *surveillance system monitor* would also be available, such job being sedentary and unskilled in nature. (*Id*.). The VE testified this job's numbers would not need to be reduced based upon the hypothetical and there existed 803,000 jobs in the national economy and 2,100 jobs in Texas. (Tr. 204).

Plaintiff first complains the ALJ erred because of his finding that plaintiff had the "general use of his hands." (Plaintiff's Brief at 5). Plaintiff refers the Court to the records of "the Administration's own referral physician" and alleges such physician "found" plaintiff's general use of his hands was restricted by his inability to hold a skillet, broom or hold his hands over his head. Such notation, however, is not an "objective finding" by a physician, but instead is a notation by the physician of plaintiff's subjective complaints. (Tr. 130). Further, as discussed previously, the physician, Dr. Mahady, made objective findings that plaintiff could fully extend his hands, could make a fist, had normal grip strength in both hands and had no signs of atrophy. (Tr. 132-133). The doctor's notes also reflect that upon questioning plaintiff admitted he could write, hold a cup of coffee, open a jar, and button his own shirt. (Tr. 130). In

a physical residual functional capacity assessment completed in December of 2001 by Dr. Scott Spoor, plaintiff was found to have no manipulative limitations (Tr. 141), and the notes reflect, "There is no focal weakness nor atrophy to support the severe exertional restrictions to less than sedentary." (Tr. 144). Also as previously discussed, plaintiff, by his own admission, testified there were many daily living activities he could perform with his hands. In the hypothetical, the ALJ, based upon plaintiff's testimony and the medical records, asked the VE to consider a person who, "has general use of his hands, but would not be able to use his hands on a continuos (sic) [basis]." (Tr. 202). Not only can it not be said such hypothetical was contrary to the evidence of record, the hypothetical tracked the testimony of plaintiff himself.

Next, plaintiff complains the ALJ erred by asking the VE to consider a person who can lift up to ten (10) pounds without clarifying whether this was occasionally or continuously. By plaintiff's own testimony he could lift ten (10) pounds. (Tr. 193). Further, from the exchange between the ALJ and the VE, it appears the ALJ did place a restriction upon the hypothetical person's use of his hands, *i.e.* that he could not use them continuously. While "Light work" involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds, 20 C.F.R. § 416.967(b), "Sedentary work" involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. 20 C.F.R. § 416.967(a). The ALJ, in his findings, determined plaintiff was able to perform a limited range of light work, stating the limitation was due to the fact plaintiff could not perform work requiring continuous hand use. (Tr. 19, Finding #6). Even assuming the hypothetical utilized by the ALJ was flawed, it cannot be said such error was harmful. One of the jobs cited by the VE as existing in significant numbers in both the national and local

economies was that of *surveillance system monitor*, a sedentary job which did not require lifting of anything over ten pounds and only occasional lifting of smaller objects. Plaintiff's claim is without merit.

Last, plaintiff complains the ALJ failed to question the Vocational Expert (VE) about the length of time plaintiff could perform various activities including the limitations of sitting only one to two hours, walking moderate distances and lifting only 1-5 pounds. (Plaintiff's Brief at 6). In his hypothetical to the VE the ALJ said,

> Okay. If we were to consider then hypothetically, Ms. Bowman, the age, education, background and experience of the Claimant which we find is limited. This individual can only lift about 10 pounds. Has general use of his hands, but would not be able to use his hands on a continuos (sic) [basis]. Sits for about 30, 45 minutes at a time. Stands for about two or three hours at a time. Can read basic material, but is not highly educated.

(Tr. 202). As set forth above, the ALJ did reference in the hypothetical, the length of time such a person would be able to perform various activities. To the extent plaintiff takes issue with the lengths of time used by the ALJ, such are supported by the record. In his opinion, the ALJ specifically referred to the opinion of Dr. Dean Brown, plaintiff's treating physician, but found such opinion to be overly restrictive. Instead, the ALJ relied on plaintiff's own representations saying, "the extreme limitations noted by Dr. Brown are in sharp contrast to the claimant's own testimony of what he is currently able to do. The claimant testified that he is able to stand for two to three hours at a time, sit for 30-45 minutes at a time, walk ½ block and lift 10 pounds....The claimant's overall daily functioning demonstrates that he is not as limited as Dr. Brown indicates." (Tr. 16). The ALJ was within his authority and his role as the fact finder in making the determinations he did. It cannot be said the ALJ failed to consider the medical records and reports of Dr. Brown in making the ultimate determination of non-disability.

Plaintiff's claim must fail.

IV.
RECOMMENDATION

THEREFORE, for all of the reasons set forth above, it is the opinion and recommendation of the undersigned to the United States District Judge that the decision of the defendant Commissioner be AFFIRMED.

V.
INSTRUCTIONS FOR SERVICE

The District Clerk is directed to send a copy of this Report and Recommendation to plaintiff's attorney of record by certified mail, return receipt requested, and to the Assistant United States Attorney by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED this 15th day of February 2006.

CLINTON E. AVERITTE
UNITED STATES MAGISTRATE JUDGE

*** NOTICE OF RIGHT TO OBJECT ***

Any party may object to these proposed findings, conclusions and recommendation. In the event a party wishes to object, they are hereby NOTIFIED that the deadline for filing objections is eleven (11) days from the date of filing as indicated by the file mark on the first page of this recommendation. Service is complete upon mailing, Fed. R. Civ. P. 5(b), and the parties are allowed a 3-day service by mail extension, Fed. R. Civ. P. 6(e). Therefore, any objections must be filed **on or before the fourteenth (14th) day after this recommendation is filed**. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); R. 4(a)(1) of Miscellaneous Order No. 6, as authorized by Local Rule 3.1, Local Rules of the United States District Courts for the Northern District of Texas.

Any such objections shall be made in a written pleading entitled "Objections to the Report and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).